BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
and	)	
	)	
Petition of SBC Communications, Inc For Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services	)	WC Docket No. 04-29

REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") hereby files its reply comments in response to the Notice of Proposed Rulemaking regarding IP-Enabled Services[1] and SBC's Petition for Forbearance[2] Regarding IP Platform Services.

I. INTRODUCTION AND SUMMARY

Most of the parties in this proceeding have focused their advocacy on the goal of avoiding unnecessary regulation for IP-enabled services while at the same time ensuring that providers of such services meet certain defined social policy objectives. As explained in its comments, ALTS agrees that these are important considerations. Indeed, as a general matter, regardless of the regulatory classification assigned to a particular IP-

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[1] *See In the Matter of IP-Enabled Services,* WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, 19 FCC Rcd 4863 ("*NPRM*") (2004).

[2] *See Petition of SBC Communications, Inc For Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29 (filed Feb. 5, 2004) ("SBC Petition").

enabled service, it should not be subjected to regulation unless there is a clear justification for doing so. As most parties acknowledge, some social policies (most importantly universal service and 911/E911) and national security (CALEA) may justify regulatory intervention. The Commission should conduct a thorough review of the relevant statutory policies in this proceeding while remaining cognizant of the need to limit regulation as much as possible.

But there are at least two other equally important issues that the Commission must address in this proceeding and that have received little attention in the comments. *First*, the Commission must ensure that competitive providers of broadband transmission services and IP-enabled services are able to obtain the inputs they need to compete. Sections 251 and 271 form the core statutory regime for enabling competitive entry. The Commission must ensure that its choice of regulatory classification for IP-enabled services does not undermine or in any way diminish competitors' abilities to obtain access to underlying facilities and inputs such as interconnection, unbundled network elements, collocation, and number portability under this framework in an IP environment. In its comments, ALTS urged the Commission to maintain a distinction between the IP application or services provided over a transmission facility and the underlying facility itself and to regulate each of those "layers" separately. Otherwise, there is concern that a competitor may only be able to obtain those essential inputs when it provides a telecommunications service (or in the case of interconnection, where it provides telephone exchange or exchange access service).

To ensure that competitors maintain access to essential underlying facilities, the Commission should also explicitly rule that competitors qualify as providing telephone exchange/exchange access telecommunications services for purposes of obtaining inputs under Sections 251 and 271 where they at least offer, on a stand-alone basis, VoIP service that is the

functional equivalent of traditional telephone service. Where a competitor also offers such voice services as part of a bundled offering sold at a single price with IP-based information services, it must still be deemed to be providing a telephone exchange/exchange access telecommunications service for purposes of Sections 251 and 271.

Second, the Commission must ensure that the regulatory regime for IP-enabled services, especially VoIP services, does not affirmatively undermine competition between or among providers of IP services and circuit-switched services. To prevent this outcome, the Commission must ensure that (1) competitors that must voluntarily hold themselves out as providers of an IP telephone exchange/exchange access telecommunications service to qualify for inputs under Sections 251 and 271 are not, as a result, subjected to federal or state regulatory obligations that differ *in any way* from VoIP service providers that do not need to make such an offer; (2) the bedrock policy of technology neutrality is advanced by ensuring that non-dominant providers of circuit-switched voice services are subject to the same federal *and state* regulatory regime that applies to providers of IP-based voice service; and (3) arbitrage opportunities are kept at a minimum by ensuring that all IP-enabled services, regardless of regulatory classification, that traverse circuit-switches (incumbent LEC or competitive LEC) are subject to appropriate intercarrier compensation rates until the Commission reforms the existing intercarrier compensation regime.

II. THE FCC MUST ENSURE THAT ITS REGULATORY REGIME FOR IP-ENABLED SERVICES ESTABLISHES THE PROPER PRECONDITIONS FOR COMPETITION.

In discussing the appropriate regulatory environment for IP-enabled services, most of the parties have understandably stressed the need to avoid unnecessary regulation while at the same time ensuring that certain core social policies are not compromised. *See, e.g.*, Comments of

AT&T at 7; Comments of NCTA at 15; Comments of Sprint at 3. ALTS agrees that these are important policy objectives. However, these reply comments focus on two other policy objectives that have received far less attention in the comments but that are critically important to the development of competition in the provision of IP services and broadband transmission.

A. Regardless of the regulatory classification of IP-enabled services themselves, the Commission must ensure competitive access to underlying transmission facilities.

Regardless of the regulatory classification of IP-enabled services themselves, the Commission must ensure the continued viability of the local competition framework established by Congress in Sections 251 and 271 of the Act. This framework is especially important for the development of competition among providers of broadband transmission. As even SBC concedes, IP-enabled services cannot flourish unless there is genuine innovation and competition among providers of the broadband *transmission* used to transmit IP-enabled services. *See* SBC Comments at 23. But SBC and the other incumbent LECs blithely ignore the reality that they possess the only viable source of broadband transmission loops, and in some cases transport, needed to serve many business customers. Thus, CLECs that rely on inputs from incumbent LECs obtained pursuant to Section 251(c) to serve such business customers represent the only source of competition and innovation for broadband transmission. For example, CLECs first developed and pioneered integrated access over T1 loops, which is now broadly demanded by small and medium-sized business customers. But of course Congress recognized in adopting Sections 251 and 271 that competitors can only provide such innovation and lower cost curves in the parts of the network that they can efficiently self-deploy if the inputs to which they are entitled under Sections 251 and 271 remain available.

Eligibility for many of the inputs competitors need from incumbents turns on whether the competitor is providing a telecommunications service or, in the case of interconnection under Section 251(c)(2), telephone exchange/exchange access service. For example, a requesting carrier may obtain (1) access to unbundled network elements only if it uses such network elements to provide a telecommunications service;[3] (2) interconnection under Section 251(c)(2) if, as mentioned, it uses such interconnection to exchange telephone exchange or exchange access traffic (*see* 47 U.S.C. § 251(c)(2)); (3) physical collocation if the competitor uses the collocation arrangement to obtain access to UNEs or to interconnect under Sections 251(c)(2) (*see id.* at § 251(c)(6)); (4) number portability to enable "users of telecommunications services" to retain their telephone numbers without service degradation where the competitor can show that such users are "switching from one telecommunications carrier to another" (*see id.* at § 251(b)(2)); and (5) dialing parity as well as access to operator service, directory assistance, and directory listings where the competitor qualifies as providing telephone exchange service or telephone toll service (*see id*. at § 251(b)(3)). Competitors also have an independent right under items 4-7 and 10 of the Section 271 competitive checklist to unbundled loops, transport and switching, access to 911/E911, directory assistance, and operator call completion services as well as to databases and associated signaling for call routing and completion (at prices set in accordance with Sections 201 and 202). *See id. at* § 271(c)(2)(B). Here again, however, the statute limits eligibility for these rights to "telecommunications carriers." *See id.*

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[3] *See* 47 U.S.C. § 251(d)(2); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 33, 995 (1996).

It follows that the manner in which the Commission classifies IP-enabled services has significant implications for the continued availability of these inputs. To the extent that the Commission classifies VoIP services generally as telecommunications services and, in particular, as telephone exchange and exchange access services, competitors will obviously continue to be eligible for essential inputs under Sections 251 and 271. Indeed, many VoIP services today appear to offer subscribers little more than "intercommunicating service" within a local exchange (*see id.* at § 153(47)) and the "origination or termination of telephone toll services" (*see id*. at § 153(16)), and such services are properly classified as telephone exchange and exchange access telecommunications services. Moreover, the Commission has held that functionalities that meet the literal terms of the definition of information service are to be deemed "adjunct-to-basic" telecommunications services to the extent such functionalities "facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service."[4] Time Warner Telecom has also pointed out that net protocol conversion offered as part of a telephone service should not render the telephone service an information service since every telephone service offers customers such capabilities (*e.g*., to enable customers to exchange calls between wireless and wireline service). *See* Comments of Time Warner Telecom at 25. All of this indicates that VoIP services that deliver to end users essentially the same functionalities as conventional telephone service should probably be classified as telecommunications services.[5] Where competitors provide such

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[4] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order, 11 FCC Rcd 21905, ¶ 107 (1996).

[5] In order to determine whether an IP service constitutes a functional equivalent for traditional telephone service, the Commission should adopt a bright line test that leaves no room for ambiguity and incumbent LEC self-help.

services, the Section 251 and 271 local competition regime should function as Congress intended.

But the future of customer demand and service innovation is uncertain. IP-based voice services might over time become integrated with information service functionalities more extensively than has been the case in the circuit-switched world. This possible development has led SBC and others to argue that such services should be classified in their entirety, including the voice component, as information services. *See* SBC Comments at 21-22. If adopted without modification, this approach could cause entire classes of customers to purchase exclusively information services.

Whatever the merits of this proposal for regulation of the retail IP-enabled services, the Commission must in all events ensure that any decision to classify IP-enabled services as information services does not cause the statutory local competition regime to be undermined. To the extent that the Commission chooses to classify bundled IP-enabled services as information services, it must ensure that the underlying transmission facilities are separately regulated and remain available as UNEs under Section 251 and 271. Furthermore, the Commission should expressly clarify that, regardless of the regulatory classification of integrated IP-enabled services generally, providers of VoIP service that supplies only the functionalities of traditional telephone service available on a stand-alone basis qualify for all of the inputs under Section 251 and 271 *even when such VoIP service is actually purchased as part of a bundled offering along with information services for a single price*. In other words, regardless of how a customer actually

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While ALTS does not propose a specific test in these reply comments, it would seem logical for such a bright line test, for example, to classify as a telecommunications service an IP-based service that only provides real-time voice transmission, that utilizes telephone numbers and that interconnects with the PSTN.

purchases such VoIP service (whether as a stand-alone product or as part of a bundled offering), the fact that a carrier holds itself out as providing the service on a stand-alone basis means that the carrier is offering telephone exchange/exchange access telecommunications services.

Permitting competitors to obtain access to Section 251 and Section 271 inputs in this manner is completely consistent with Commission precedent. For example, the Commission observed in the *Triennial Review Order* that "[a]llowing requesting carriers to use UNEs to provide multiple services" in addition to telecommunications services "permit[s] carriers to create a package of local, long distance, international, information, and other services tailored to the customer."[6] Permitting competitors to provide bundled service offerings *via* UNEs is critical because "carriers must have sufficient flexibility in how they package service offerings to customers in order to . . . fully participate in the telecommunications market." *Triennial Review Order* ¶ 146. Similarly, the Commission has expressly found that allowing carriers to collocate multi-functional equipment used for both qualifying services (*i.e.*, access to UNEs and/or the exchange of telephone exchange or exchange access traffic) and non-qualifying services, such as information services, "is critical to the realization of Congress's goal of promoting competition and technical innovation."[7]

The Commission has defined "bundled" offerings as "two or more products or services [offered] at a single price, typically less than the sum of the separate prices,"[8] and it has

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[6] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand, 18 FCC Rcd 16978, ¶ 146 (2003) ("*Triennial Review Order*").

[7] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd 15435, ¶ 33 (2001).

[8] *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934 as amended; 1998 Biennial Regulatory Review -- Review of Customer Premises*

explicitly held that there is "no prohibition on the bundling of basic telecommunications services and enhanced services at a single, discounted price for any carrier." *See Bundling Order* ¶ 39. In so doing, the Commission concluded that permitting such bundling promotes consumer welfare. *See id.* ¶ 41. Moreover, the Commission explained that bundling of separate information and telecommunications services should not be confused with the situation in which a carrier provides information services *via* underlying transmission that they offer separately to others on a stand-alone basis. *See id.* In the former case, the customer receives *both* an information service, for example voice mail, and telecommunications service, for example telephone exchange service, for a single price. The fact that the service provider offers the two services for a single price does not render the telephone exchange service an information service (and of course it does not render the voice mail a telecommunication service). In the latter case, *i.e.*, where a carrier provides an information service *via* transmission that it offers to others as a stand-alone telecommunications service, the combined offering is an information service. The point here is that the Commission should allow competitors to meet the statutory requirements for obtaining local competition inputs under Section 251 and 271 by permitting them to engage in the first type of bundling so that they would offer customers a bundle of IP-enabled telecommunications services and information services for a single price.

This approach would allow competitors to obtain all of the inputs they need under Section 251 and 271 with possibly one exception -- number portability. Number portability is defined in the statute as the ability of "users of telecommunications services to retain" their

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Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets, Report and Order, 16 FCC Rcd 7418, ¶ 15 (2001) ("*Bundling Order*"). The Commission has distinguished bundling from "one stop shopping," in which "consumers may purchase the components of a bundle, priced separately, from a single supplier." *Id.*

telephone numbers when "switching from one telecommunications carrier to another." 47 U.S.C. § 153(30). The statute thus seems to require that both the customer's existing service and the service to which it seeks to switch be classified as telecommunication services. Accordingly, if a provider of VoIP services is able to escape the telecommunications service classification by integrating its voice service with information service capabilities that do not fall within the adjunct-to-basic category, that voice provider could argue that it is not subject to number portability. Indeed, even if the VoIP service provider relies on a carrier (which would presumably be subject to number portability obligations) to obtain numbering resources, the VoIP service provider could claim that *it* is the end user associated with the numbers assigned to its customers and could attempt to prevent its customers' numbers from being ported.

Nevertheless, the Commission has the authority to address this problem in several different ways. For example, under the current rules, only carriers can obtain access to telephone numbers.[9] The Commission could clarify that, where such carriers provide telecommunications services to providers of IP-enabled services classified as information services, the carrier must ensure, as a condition of providing service, that the IP-enabled services provider will allow *its* customers to port their telephone numbers to other providers of IP-enabled service. The Commission would have the authority to impose such an obligation pursuant to Section 202(a) because it is necessary to prevent the number portability regime from applying in a manner that

[9] *See* 47 C.F.R. § 52.15(g)(2)(i) (requiring that an entity demonstrate that it is "authorized to provide service in the area for which the numbering resources are being requested"); *Numbering Resource Optimization*, Report and Order, 15 FCC Rcd 7574, ¶ 97 (2000) (clarifying that entities must show that they are licensed to provide telecommunications service in a state before they may obtain numbering resources).

is "unjustly discriminatory" (benefiting only customers that switch from one telecommunications service to another).

Alternatively, as SBC suggests, the Commission could make numbering resources available directly to some or all providers of IP-enabled services (even those classified as information services) on the condition that the providers of IP-enabled services comply with number portability. *See* SBC Comments at 94. Section 251(e)(1) grants the FCC the authority to ensure that numbering resources are available on an "equitable" basis. *See* 47 U.S.C. § 251(e)(1). Pursuant to this charge, the Commission could be understood to have the authority to ensure that all users of telephone numbers are subject to the same regulations governing the use of such numbers (thus ensuring that the distribution is "equitable"). Furthermore, the Commission should apply to small VoIP providers only those numbering optimization requirements that are necessary to ensure that numbering distribution is equitable.

B. The Commission must avoid arbitrary discrimination between or among providers of IP-enabled services and circuit-switched services.

The Commission must ensure that it does not skew investment decisions and distort market outcomes by arbitrarily discriminating between or among differently classified IP-enabled services or circuit-switched services. To begin with, the Commission must not impose extra regulatory burdens upon competitors that, as discussed, voluntarily provide IP-enabled services as telecommunications services in order to qualify for Section 251 and Section 271 inputs. Carriers in this position should be subject to precisely the same federal and state regulatory regime as providers of competing services classified as information services. Competitors that must voluntarily provide telecommunications services must not, for example, be subject to different regulations associated with universal service, access to the disabled, truth-in-billing, slamming, or privacy than would be case for competitors that need not qualify to

obtain inputs from incumbent LECs. Any other result would stand the logic of the 1996 Act on its head, since that statute was intended to *lower* the barriers to entry for those that require access to essential inputs from incumbent LECs.

Similarly, the Commission must ensure that it advances the bedrock policy of technology neutrality[10] by ensuring that VoIP services are not granted regulatory advantages over competing providers of circuit-switched voice service. As NCTA explains, "the development of a minimally regulated environment for VoIP services ought to provide a basis for revisiting -- and reducing -- the regulatory requirements that apply to traditional circuit-switched, facilities-based CLEC services."[11] This is an especially important issue with regard to state regulation. As Cox and Time Warner Telecom explain, several states continue to impose substantial regulatory burdens on circuit-switched competitive LECs. *See* Comments of Cox at 20-21; Comments of Time Warner Telecom at 39. Regulations such as cost-of-service reporting, service quality reporting and penalties, and the obligation to obtain prior approval for the sale of securities are unnecessary for nondominant carriers and force competitors to incur substantial costs. At the very least, the Commission should work with the states *via* a joint board mechanism to establish a model state regulatory regime applicable to all types of voice service, regardless of the technology used to provide them. *See* Comments of Cox at 21; Comments of Time Warner

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[10] *See, e.g., Establishment of Policies and Service Rules for the Non-Geostationary Satellite Orbit, Fixed Satellite Service in the Ka-Band*, Report and Order, 18 FCC Rcd 14708, ¶ 10 (2003) (holding that the choice of frequency sharing options **"**should be technologically neutral, not favoring any particular technology or operational method."); *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC 8776, ¶ 27 (1997) (holding that contributions to and distribution of the high-cost fund should be "competitively and technologically neutral").

[11] National Cable & Telecommunications Association, "Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition" (Feb. 2004) at 48, available at <http://www.ncta.com/pdf_files/VoIPWhitePaper.pdf>.

Telecom at 39-40. Moreover, to the extent that a state fails to comply with such model telephone service regulations, the Commission should consider exercising its preemption power under Section 253 and under the impossibility doctrine[12] to the extent necessary to ensure uniform state regulation of competing voice services.

Finally, the Commission must ensure that its intercarrier compensation rules do not create "artificial incentives for carriers to convert to IP networks"[13] or artificial advantages among competing providers of IP-enabled services. To be sure, the development of IP-enabled services, especially VoIP services, has once again illustrated the need to reform the existing intercarrier compensation regime. But until the Commission implements such reform, it must seek to apply appropriate intercarrier compensation charges to VoIP in the manner that is least likely to impose different costs on competing VoIP telecommunications services, VoIP information services and circuit-switched voice services. This goal is advanced most effectively by applying intercarrier compensation rates to all traffic that traverses incumbent and competitive LEC circuit switches. This approach treats all VoIP traffic the same way, regardless of regulatory classification, thus eliminating inefficient incentives for service providers to design their services to fit a regulatory classification.

III. CONCLUSION

In establishing a regulatory regime for IP-enabled services, the Commission must establish clear and legally sound means for service providers to obtain access to the inputs they

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[12] *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 at n.4 (1986).

[13] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶ 18 (2004).

need to compete pursuant to Sections 251 and 271. The Commission must also ensure that its rules do not arbitrarily and inefficiently discriminate between or among differently classified IP-enabled services or circuit-switched services.

Respectfully submitted,

/s/

Jason D. Oxman, General Counsel
Teresa K. Gaugler, Assistant General Counsel
Associations for Local
Telecommunications Services
888 17th Street, N.W., Suite 1200
Washington, D.C. 20006
(202) 969-2587
joxman@alts.org
tgaugler@alts.org

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